

FELICIANO Y. JIMENEZ
MARGARITA R. JIMENEZ

IBLA 75-511

Decided April 27, 1977

Appeal from decision of Nevada State Office declaring Dee lode mining claim null and void ab initio and rejecting application NEV-065768 to purchase a part of that mining claim under the Mining Claim Occupancy Act.

Affirmed in part; vacated and remanded in part.

1. Mining Occupancy Act: Generally! ! Trespass: Generally

A mining claim void ab initio may be a proper basis for a conveyance under the Mining Claim Occupancy Act, but pursuant to 30 U.S.C. § 706 (1970) trespass damages should ordinarily be assessed.

APPEARANCES: Ellis R. Ferguson, Esq., Reno, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Feliciano Y. Jimenez and Margarita R. Jimenez appeal from a decision of the Nevada State Office, Bureau of Land Management, dated March 28, 1975, declaring the Dee lode mining claim null and void ab initio and rejecting a timely application to purchase a part of that claim under the Mining Claim Occupancy Act, 30 U.S.C. § 701 et seq. (1970). The decision stated that the claim was null and void ab initio because it was located on lands which were withdrawn. The decision held that a mining claim null and void ab initio could not be the basis for an application to purchase under the Mining Claim Occupancy Act.

The claim was located on December 27, 1947, by Dailas and Amy de Fluiter who are stated to have transferred the claim to appellants

on January 18, 1949. ^{1/} In May 1950 a five! room frame house was completed, which appellants allege they have used as their permanent home since that date. In their petition for a statement of belief concerning the validity of the mining claim, appellants state that the claim is located in the "SE 1/4 of sec. 28 T 20 NRE [sic] M.D.B. & M., Wedekind Mining Dist. Washoe County Nevada." This land had been withdrawn by a first form reclamation withdrawal on December 10, 1920. On appeal, evidence was submitted indicating that the withdrawal was revoked as to lots 6 and 7 of section 28 on January 8, 1929. In a mineral report of April 4, 1968, the claim was described as being in the NW 1/4 SE 1/4, NE 1/4 SW 1/4, and SE 1/4 NW 1/4 of section 28, T. 20 N., R. 20 E., M.D.M. The residence, ancillary improvements and discovery were said to be in the NE 1/4 SW 1/4 of section 28. The District Geologist concluded in the report that no valid discovery of a valuable mineral had been made within the limits of the claim and that the lands involved are nonmineral in character as defined in the departmental regulations.

In its decision of March 28, 1975, the State Office explained that the application to purchase was based on the Dee lode claim which was located on December 27, 1947, on lands which were withdrawn from mining location on December 10, 1920. The decision concluded that since the lands were not open to mining location at the time of location of the Dee lode, the claim was null and void ab initio.

Concerning the application to purchase under the Mining Claim Occupancy Act, the State Office held:

The authority under which you applied for title to the lands in the Dee claim (The Act of October 23, 1962) was to convey to any qualified applicant of an unpatented mining claim which is determined by the Secretary of the Interior to be invalid, an interest, up to and including a fee simple title. The basis for the conveyance is a mining claim. To have a mining claim, a discovery of valuable mineral must be made on lands which are open to such entry. The Dee lode claim was located on lands not open to location and, therefore, is considered to have never been a claim. Your application is rejected because it is based on a non! existent mining claim.

^{1/} We note that the file does not contain a copy of the deed by which this claim was transferred to appellant. The record should be supplemented by this deed, so that it will be more clear what lands are included in the application.

Appellants contend the records of the Nevada Land Office disclose that the withdrawal of December 10, 1920, was not effective as to the land embraced by their claim because this land had been effectively segregated from the public domain by the location of the Sullivan Group of lode claims in 1900. They also assert that the partial revocation of the withdrawal on January 8, 1929, restored lots 6 and 7 to entry under the mining laws.

[1] Where a mining claim occupies land that is subsequently withdrawn from mining location, if the claim was not supported by a qualifying discovery at the time of the withdrawal, the land is not excepted from the effect of the withdrawal. Cameron v. United States, 252 U.S. 450 (1920); United States v. Almgren, 17 IBLA 295 (1974). There is no persuasive evidence herein of discoveries on the claims comprising the Sullivan Group at the time of the withdrawal.

The mineral report states that appellants' improvements are located in the NE 1/4 of the SW 1/4 of section 28. Appellants have not shown that the Dee Lode claim was located in lots 6 or 7, apparently restored to entry under the mining laws by the partial revocation of the reclamation withdrawal. Appellant's improvements seem clearly outside the restored area. 2/

Assuming that the claim was located on withdrawn lands, the provisions of 30 U.S.C. § 706 (1970) indicate that the application could still be allowed. Section 706 provides in part:

(a) The execution of a conveyance as authorized by section 701 of this title shall not relieve any occupant of the land conveyed of any liability, existing on the date of said conveyance, to the United States for unauthorized use of the land in and to which an interest is conveyed.

(b) Except where a mining claim embracing land applied for under this chapter by a qualified applicant was located at a time when the land included therein was withdrawn or otherwise not subject to such location, no trespass charges shall be sought or collected by the United States from any qualified applicant who has filed an application for land in the mining claim pursuant to this chapter, based upon occupancy of such claim * * *. [Emphasis added.]

2/ See Brunton Compass Map, 2 March, 1967.

The most reasonable construction of the "exception" clause in subsection (b) is that the Act does authorize conveyance of land embraced by a mining claim despite the fact that the claim was located at a time when the land was withdrawn. Rulon Stephen Scott, 11 IBLA 287 (1973). Ordinarily, trespass damages should be assessed in such a situation. Scott, supra at 290.

While a void ab initio mining claim may, in the discretion of the Secretary, be the basis for a conveyance of land under the Act, it is necessary for the State Office to determine whether such conveyance should be granted and the extent thereof.

The State Office decision made no ruling as to whether appellants are qualified applicants. 3/ The case should be remanded to the State Office for consideration of material submitted on appeal, in connection with the following:

1. Whether appellants are qualified applicants.
2. Whether an interest in the land should be offered, and the location and extent of such interest.
3. The extent to which trespass charges should be imposed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, that portion of the State Office decision declaring the Dee lode mining claim null and void ab initio is affirmed. That portion rejecting the application to purchase under the Mining Claim Occupancy Act is reversed and the case remanded to the State Office for determination of the matters set forth in this decision.

Joseph W. Goss
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Joan B. Thompson
Administrative Judge

3/ See Memorandum from Chief, Branch of Lands and Minerals Operations to District Manager, Carson City, March 28, 1975.

